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STATE OF MICHIGAN

IN THE SUPREME COURT

SUPREME COURT NO.

KEITH BRONNER, an individual
Plaintiff,

COA Docket No. 340930
WCCC No.: 15-013452-NF

-v-

CITY OF DETROIT, a Municipal Corporation,
Defendant and Third-Party Plaintiff/Appellant,

-v-

GFL ENVIRONMENTAL USA INC., f/k/a RIZZO ENVIRONMENTAL SERVICES, INC.,
Third-Party Defendant/Appellee.

/

CITY OF DETROIT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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September 16, 2019

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STATEMENT OF JURISDICTION AND ORDER APPEALED FROM

The court of appeals issued its opinion on July 9, 2019, reversing the trial court's grant of summary disposition in favor of the City of Detroit and directing entry of summary disposition in favor of GFL Environmental USA, Inc. The City filed a timely motion for reconsideration on July 19, 2019, which was denied on August 9, 2019. This application is timely filed pursuant to MCR 7.305(C)(2).

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STATEMENT OF QUESTIONS PRESENTED

The City of Detroit's contract with its trash collection vendor (GFL) contains a broad indemnification clause protecting the City from any liabilities or obligations resulting from the negligence of GFL or its agents. A GFL driver negligently collided with a City bus resulting in the City's payment of first party no-fault benefits to plaintiff Bronner. This case involves the question whether the City can enforce that indemnification provision and recover from GFL the amounts paid to Bronner.

1. Is GFL's indemnification obligation unenforceable under the no-fault act where:

A. Supreme Court authority holds that the City's common law right to freedom of contract, and the City's constitutional home rule right to protect its taxpayers from negligent acts of vendors; cannot be impaired absent an express statutory provision which is entirely absent here; and

B. Nothing in the no-fault act purports to preclude such an indemnification provision, the indemnification provision operates outside of and had no impact on application of the no-fault law or the City's proper payment of no-fault benefits to Bronner, and the indemnification provision serves an important public purpose in protecting City taxpayers?

The court of appeals answers yes.
Appellee GFL answers yes.
The City answers no.

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GROUNDS FOR THE APPLICATION

A. MCR 7.305(B)(2) – This case is brought by a subdivision of the state (City of Detroit) and raises an issue of significant public interest.

The City's annual bus ridership is approximately **25 million**. Ex. 1. Not surprisingly, the City, after extensive efforts, has been unable to secure insurance (or excess insurance) that provides meaningful protection. The City has been approved by the state to self-insure. As a self-insurer, the City cannot participate in the Michigan Catastrophic Claims Association (MCCA) so the City's potential liability is unlimited. The City pays out millions of dollars annually in first and third party no-fault benefits.

The City has been working hard to better train its bus drivers and otherwise reduce its no-fault exposure. But this case shows that no matter how diligent the City's efforts, it can incur significant first-part liability due entirely to the negligent acts of a third party – here GFL.

The City engaged GFL to collect trash under a **$49.1 million contract**. Ex. 2, p. 13, ¶7.01. The contract included a broad indemnity clause to protect the City and its taxpayers in exactly the situation that arose here. Ex. 2, p. 15, ¶9.01.

The contract required GFL to carry significant insurance coverage to protect the City. Ex. 2, pp. 16-17. Obviously, GFL prices the cost of that insurance into the fees charged to the City.

This case involved an indemnification claim of roughly $100,000. But if next

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week a GFL garbage truck negligent slams into a City bus full of passengers, the City's first party liability – which is unlimited – could be in the millions or more.

The public interest is served by having the negligent vendor, which purchased insurance to protect against this result, bear that liability rather than City taxpayers. One of any city's most fundamental obligations is to protect its taxpayers from liabilities caused by the negligence of third party vendors. If Detroit is to be forbidden from doing so, there should be clear statutory language and a clear prohibition in the no-fault act to support such a harsh result. Here there is neither.

B. MCR 7.305(B)(3) – the issue here involves a legal principle of major significance to the state's jurisprudence.

The lower court's decision is not supported by any decision of this Court and represents an exponential expansion of the Judiciary's ability to void municipal contracts. The indemnification contract at issue here clearly serves an important public purpose. If the Judiciary indeed has the authority to void such an important contract based on "negative implication," Op, ex. 3, p. 7, such a significant decision should be carefully reasoned and scrutinized.

As shown in this brief, the lower court failed to identify any provision of the no-fault act which was "violated," or even affected by, the indemnification contract. There is none. Whether the City's indemnification protection should be stricken by negative implication under the no-fault act is of major significance to the state's jurisprudence.

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C. MCR 7.205(B)(5)(a) – the decision is clearly erroneous and will cause material injustice.

This Court has never invalidated a municipal contract on grounds remotely similar to those here. To the contrary, this Court has embraced the following fundamental principles which reject the lower court's decision:

- Statutes will not be extended by implication to abrogate established rules of common law – the applicable common law rule here being freedom of contract. *Koenig v City of S Haven*, 460 Mich 667, 678 fn 3 (1999).
- Home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. *Associated Builders v City of Lansing*, 499 Mich 177, fn 29 (2016).
- The circumstances under which a contract provision can be said to violate law are narrow. *Defrain v State Farm*, 491 Mich 359, 372, 373 (2012).

The lower court here voided the indemnification clause by extending the no-fault act by implication to preclude something - the City's contractual right to indemnification - that the no-fault act itself does not even address let alone prohibit. And the uncontested facts show that the City's indemnification claim was completely outside the no-fault act, had no affect whatever on the functioning of the no-fault act, and did not affect Bronner's proper recovery of first party benefits. The lower court's decision is clearly erroneous and, as described above, will result in

material injustice to the City and its taxpayers.

FACTS

The operative facts in this case are uncontested and are, for the most part, accurately set forth by the lower court's decision. Ex. 3. In short, a GFL garbage truck negligently ran into a City bus and injured plaintiff Bronner. The City, being self-insured, paid a total of roughly $100,000 in first party no-fault benefits to Bronner. The question here is whether the City was entitled to recoup those amounts from GFL under the broad indemnification clause in the parties' contract.[1]

One fact needs clarification. The court of appeals states that "When the City refused to pay the no-fault benefits, Bronner initiated a lawsuit." Ex. 3, p. 2. That suggests the City did not pay no-fault benefits until suit was filed.

In fact, following the accident the City's third party administrator voluntarily paid tens of thousands of dollars in first party benefits to Bronner. Ex. 4, payment history. The City only ceased payment when, as so often happens in these cases, there was a dispute as to the reasonableness or necessity of continued treatment. After Bronner filed suit in Wayne County Circuit Court, the City, while negotiating a settlement of Bronner's claim, separately raised the indemnification issue by filing a third-party complaint against GFL.

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[1]The City requested and received an award of attorney fees from the trial court. The court of appeals reversed that award. To sharpen and narrow the issues on appeal, the City is not asking this Court to review the attorney fee dispute.

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PROCEDURAL BACKGROUND

The City and GFL argued cross-motions for summary disposition on August 16 and October 21, 2016. Ex's 5 and 6. The trial court entered an order on November 2, 2016 granting the City's summary disposition motion. Ex. 8. The court thereafter issued a written opinion on August 28, 2017 explaining that it had awarded summary disposition to the City based on its contractual indemnity claim. Ex. 7. The City and Bronner settled the first party dispute and the City paid the agreed amounts. The court entered a final judgment on the City's indemnification claim on October 13, 2017. Ex. 9.

The City had also argued that the contract effectively made GFL the primary insurer. That was not a sound argument, the trial court properly rejected it and the City has abandoned it on appeal. The court of appeals so acknowledged in its opinion: "We conclude that although the City did not transfer its obligation to pay no-fault benefits, the no-fault act does not permit the City to seek indemnification from GFL." Ex. 3, p. 3. The court also stated: "However, the City paid no-fault benefits to Bronner. Therefore, no impermissible shift in priority occurred through the contract." Ex. 3, p. 5.

GFL appealed the trial court's decision and the court of appeals reversed. Ex. 3. The City moved for reconsideration which was denied without comment by the court's August 9, 2010 order. Ex. 10. The decision was unpublished but GFL has

requested publication.

STANDARD OF REVIEW

This case involves questions of law and statutory interpretation which this Court reviews de novo. *Velez v Tuma*, 492 Mich 1, 11 (2012).

ARGUMENT

I. The lower court erred by failing to acknowledge or apply controlling Supreme Court authority that forbids voiding the indemnification provision based on implication.

The lower court held that the City is powerless to protect its taxpayers from losses that result when a vendor's vehicle, in this case a GFL garbage truck, negligently collides with a city bus causing injuries. The court reached that result despite acknowledging that parties have the utmost liberty of contracting unless the contract is in violation of law or public policy, ex. 3, p. 3, and that the no-fault act does not expressly prohibit the City's right to obtain contractual indemnity from a vendor. Ex. 3, p. 6.

The lower court's opinion does not acknowledge or apply any of the following fundamental principles of statutory construction which prohibit voiding this important and freely negotiated contract based on implication.

City's common law right to freedom of contract. "Statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law." *Koenig v City of S Haven*, 460 Mich

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667, 678 fn 3 (1999), emphasis added. When the meaning of a statute is unclear, it is to be "given the effect which makes the least rather than the most change in the common law." *Id. See also Velez v Tuma*, 492 Mich 1, 11 (2012), (Court held the Legislature did not abrogate common-law setoff rule and stated "[T]he Legislature 'should speak in no uncertain terms' when it exercises its authority to modify the common law.") Here, the City's freedom to enter into an indemnification contract with GFL is a bedrock right under common law. That common law right cannot be abrogated by implication which is exactly what the lower court held.

City has home rule right to exercise all powers not expressly denied. In *Associated Builders v City of Lansing*, 499 Mich 177 (2016), this Court upheld Lansing's ability to require contractors performing municipal contracts to pay laborers prevailing wages and benefits. "We have held that 'home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied.'" *Id*, fn 29, (also observing that home rule allows cities to consider their "unique needs"). In response to plaintiff's argument that such wages implicated matters of state concern, this Court responded: "If a municipality has broad powers over local concerns, it certainly has the power to set terms for the contracts it enters into with third parties for its own municipal projects * * *." *Id* at p. 187-188.

The City of Detroit, with limited financial resources, operates by far and away the largest public transit system in the state. In carrying out those "unique needs,"

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the City has acted to protect its taxpayers from losses resulting from a negligent vendor. That important municipal power cannot be abrogated except by an express statutory provision - which is entirely absent here.

Circumstances under which a contract provision can be said to violate law are narrow. In *DeFrain v State Farm*, 491 Mich 359 (2012), the Court rejected a challenge to an insurance contract provision that shortened the time frame in which notice of a hit-and-run accident had to be provided. This Court explained that "the right to contract freely" sharply limited the Judiciaries ability to interfere with unambiguous contract provisions. *Id* at p. 372. The Court also held: "The circumstances under which a contract provision can be said to violate law or public policy are likewise narrow." Id at 372, 373 (2012).

The no-fault act is completely silent on the City's right to obtain indemnification. The lower court acknowledged "there is no provision expressly prohibiting an insurer from contracting away the cost of its obligation to provide mandatory PIP benefits * * *." Ex. 3, p. 6. Under the cited authorities, that should have been the end of the analysis. The court nonetheless voided the indemnification provision by implication. That was clear error particularly because, as shown below, the GFL indemnification provision did not implicate the no-fault act and did not affect in any way Bronner's receipt of PIP benefits from the City.

II. The above cited legal principles apply with particular force here, where the indemnification provision does not affect the operation of the no-fault

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act or the payment of benefits thereunder.

The lower court correctly observed that because the City self-insures under the no-fault act, the City assumes all of the obligations and rights of a no-fault insurer under the no-fault act. Ex. 3, pp. 4 – 5. The City fulfilled all such obligations. But the City did not thereby lose by implication its common law right of freedom of contract or its rights under the home rule cities act.

The lower court conceded that the indemnification provision did not interfere with the functioning of the no-fault act or the City's payment of benefits to Bronner. The indemnity provision only became operative after the City properly paid Bronner's PIP benefits. At that point the no-fault act was no longer relevant. The payments for which the City sought indemnity were simply a monetary loss subject to recoupment under the unambiguous coverage of the indemnification provisions.

III. The lower court's case citations are inapposite.

The court of appeals begins its opinion by discussing *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491 (2001). Ex. 3, pp. 5-6. There, this Court upheld a contract that shifted the liability for collision damages from the owner of the vehicle (car dealership) to the individual who was borrowing the vehicle while her car was being repaired. The Court relied on the following principle: "Nothing in the no-fault system relieves a motor vehicle operator of liability which he may have incurred in contract." *Id* at p. 500.

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In footnote 4, the Court limited its holding to collision damages - which is not a mandated coverage under the no-fault act. In the same footnote the Court expressed "no view regarding the legality of a contract purporting to shift liability for other categories of damages." Emphasis added.

The lower court found that statement significant (Op., p. 6) when, in reality, it is irrelevant. The court of appeals itself acknowledged that the City paid Bronner's PIP benefits and, accordingly, "no shift in priority occurred through the contract." Ex. 3, p. 5. Nothing in the indemnification contract impacts the no-fault act or "shifts" the City's obligations as a self-insurer in any fashion.

The lower court also supported its decision by noting that the no-fault act is a "comprehensive scheme." Ex. 3, p. 6. Likewise, this Court has recognized that "Michigan's no-fault insurance system is a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 399 (2018).

But the City fully acknowledged, and acknowledges, its obligations as sole insurer under the no-fault act and properly paid Bronner's no-fault benefits. Where the no-fault act is silent on indemnification, and the contractual indemnification provision does not interfere with the proper functioning of the act, there is no basis for nullifying the contract provision by implication. The City's right to contract freely, and use its home rule authority to protect its taxpayers, confirm that result.

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The lower court also cited the fact that the no-fault act provides "limited avenues" for insurers to recover costs incurred in paying PIP benefits. Ex. 3, pp. 6-7. None of those avenues are relevant here. The court then states: "By negative implication of these provisions, other reimbursement mechanisms are prohibited." Ex. 3, p. 7, emphasis added. As shown above, the City's right to freely contract and exercise its home rule powers cannot be negated by "implication."[2]

Finally, the court below relied on the following principle of law: "[i]t is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than the one the court prefers." Ex. 3, p. 7, citing *City of S Haven v Van Buren Bd of Com'rs*, 478 Mich 518, 528-29 (2007). In *South Haven*, Van Buren County collected road millage proceeds raised under MCL 224.20b. The County used all of the proceeds to repair county roads, in violation of the statute requiring the proceeds to be shared with cities and villages in the county.

South Haven sued for the County's violation of the statute. This Court agreed there had been a violation. The Court, however, denied the requested relief of restitution because the statute did not provide for such relief. Under the statute only

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[2]The court focused primarily on insurers' ability to recover of PIP costs above a certain threshold through the Michigan Catastrophic Claims Association. As discussed above, due to the City's unique circumstances it cannot purchase insurance and cannot participate in the MCCA. The home rule cities' act recognizes the City's right to address such unique circumstances by, in this case, obtaining indemnification from its vendor.

the Attorney General was authorized to seek relief. The Court explained: "Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Id* at p. 529.

South Haven is inapposite here because the City is not suing to enforce, or for a violation of, the no-fault act. So whatever remedies the no-fault act may or may not provide are irrelevant. The only remedy the City seeks is under its contract with GFL. And that contractual remedy could be impaired only by clear and express legislation which, as discussed, is completely absent here.

CONCLUSION AND RELIEF

The City respectfully requests that the Court grant its application for leave to appeal, reverse the court of appeals decision on the indemnification issue and affirm the trial court's decision on that issue.

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 16, 2019, he arranged for e-filing of the foregoing application and exhibits thereby providing service on all counsel of record.

/s/Charles N. Raimi